Supreme Court, U.S.
FILED

No. 10-390

SEP 21 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

EDWIN A. EHLERS
SERGEANT/E5 U.S. MARINE CORPS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Armed Forces

---

Petition For Writ Of Certiorari

Michael D.J. Eisenberg
Counsel of Record
Law Office of Michael D.J. Eisenberg
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 558-6371
Michael@Eisenberg-Lawoffice.com

Counsel for Petitioner *Dated: September 21, 2010*

THE LEX GROUP[DC] • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

The Appellant, through Counsel, presents the following questions for this Court's review. The Appellant was denied by the Government his Fifth Amendment Right to Due Process and Sixth Amendment Right to Compulsory Process during his criminal trial before the US Navy Marine Corps Court of Criminal Appeals. The Military failed to perform its duties in following its directives when investigating and prosecuting the underlying crimes (e.g., DoDI 6495.02).

The Government Prosecution failed to not only bring forth the exculpatory evidence before the Military Court but also failed to bring forth the necessary prerequisites to satisfy the elements of each crime. Instead, it relied solely on the egregious nature of the crime. These failures strongly contributed to the Appellant's inability to raise a proper defense at trial. This denied him a fair trial and his Constitutional Right to due process and a fair trial.

Appellant's Six Amendment Right to Counsel was further violated by the military's detailed defense counsel failure to zealously defend Appellant. The Detailed Defense Counsel ("DDC") failed to pursue simple investigations where the Government had been lacking. The DDC further failed to bring forth the medical expert (who was going to exculpate Appellant) that the DDC had earlier fought so hard to obtain. The Government Prosecution further violated Appellant's rights by contacting his witnesses, informing them that they

were with the Defense, and informed them that Appellant was guilty and had admitted to the crimes.

Again, the egregious nature of the underlying crimes led the Government to unreasonable multiplication of the charges and also multiplicity. Instead of providing the proof to meet the elements of the crime, the Government stacked the charges against Appellant in order to paint him as a serial child molester. This "piling on" effect denied Appellant his Constitutional Right to a fair trial.

The compilation of the aforementioned Constitutional violations led to a wholly disproportionate and unfair sentence for the Appellant.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

CITATION TO OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS/ORDER 1

JURISDICTION STATEMENT 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS 1

STATEMENT OF THE CASE 2

I. Jurisdictional History 2

II. Facts Adduced for Trial 5

ARGUMENT 8

A. THE EVIDENCE ADDUCED AT TRIAL IS BOTH FACTUALLY AND LEGALLY INSUFFICIENT TO CONVICT PETITIONER OF CHARGES I and II 8

i. PROSECUTION FAILED TO PROVE THAT PETITIONER SODOMIZED HS 9

ii. PETITIONER'S TESTIMONY WAS SO VAGUE AND AMBIGUOUS AFTER QUESTIONING BY THE MILITARY JUDGE THAT IT WAS INSUFFICIENT TO CLARIFY PETITIONER'S INNOCENCE 11

iii. THE FAULTY FOUNDATION UPON WHICH THIS CASE WAS INITIATED QUESTIONS WHETHER THE LEGAL AND FACTUAL GROUNDS WERE SUFFICIENT TO CONVICT PETITIONER LET ALONE TO BRINGS THIS CASE TO TRIAL 13

a. HS's Statements And Actions Before And During Trial Are So Inconsistent That Their Veracity Is Legally And Factually Insufficient To Convict Petitioner 13

b. RP2 Paul Skovranko's Statements And Actions Before And During Trial Are So Inconsistent That Their Veracity Is Deficient To Be Legally And Factually Sufficient To Convict Petitioner 17

iv. PROSECUTION FAILED TO PROVE THAT PETITIONER FORMED THE INTENT GRATIFY THE SEXUAL DESIRES OF THE APPELLANT IN THE COURSE OF CHARGE II AND ITS TWO SPECIFICATIONS 18

B. PETITIONER WAS PREJUDICED BEFORE AND DURING THE TRIAL BY THE MILITARY'S MISCONDUCT 21

i. PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE GOVERNMENT DETAILED DEFENSE COUNSEL'S FAILURE TO ZEALOUSLY DEFEND PETITIONER 21

ii. THE GOVERNMENT INTERFERED WITH THE PETITIONER'S DEFENSE AND AS A RESULT, PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS 26

iii. PETITIONER WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTION'S ACTS OF UNLAWFUL COMMAND INFLUENCE 31

C. CHARGES I AND II AND ADDITIONAL CHARGES I AND II AND ALL OF THEIR SPECIFICATIONS CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES .. 36

CONCLUSION 39

APPENDIX

Order of
The United States Court of Appeals
For the Armed Forces
Re: Denying Petition for Review

entered April 23, 2010 ..... 1a

Opinion of
The United States Navy-Marine Corps
Court of Criminal Appeals
entered June 30, 2009 ..... 3a

Order of
The United States Court of Appeals
For the Armed Forces
Re: Denying Petition for Reconsideration
entered June 23, 2010 ..... 25a

TABLE OF AUTHORITIES

Page(s)

CASES

Florida v. Nixon,
543 U.S. 175 21

Jackson v. Virginia,
443 U.S. 307 (1979) 8

Strickland v. Washington,
466 U.S. 668 (1984) 21, 22

United States v. Ball,
470 U.S. 856 (1985) 37

United States v. Britton,
47 M.J. 195 (C.A.A.F. 1997) 37

United States v. Carpenter,
No. 20020894
A. Ct. Crim. App. June 22, 2004) 39

United States v. Clark,
49 M.J. 98 (1998) 24

United States v. Edmond,
63 M.J. 343 (C.A.A.F. 2006) 21, 27, 28, 30

United States v. Fletcher,
62 M.J. 175 (C.A.A.F. 2005) 28

United States v. Frelix-Vann,
55 M.J. 329 (C.A.A.F. 2001) 37

United States v. Garcia,
59 M.J. 447 (C.A.A.F. 2004) 21

United States v. Gore,
60 M.J. 178 (C.A.A.F. 2004) 31, 35

United States v. Grigoruk,
52 M.J. 312 (2000) 22, 24, 25

United States v. Harville,
14 M.J. 270 (C.M.A. 1982) 8

United States v. Lewis,
42 M.J. 1 (1995) 24

United States v. Lewis,
63 M.J. 405 (2006) 31, 32, 34, 35

United States v. Nelson,
2003 CCA LEXIS 249
(A.F. Ct. Crim. App. 2003) 37

United States v. Polk,
32 M.J. 150 (1991) 23

United States v. Quiroz,
53 M.J. 600
(N-M. Ct. Crim. App. 2000) 36, 37, 38

United States v. Quiroz,
55 M.J. 334 (C.A.A.F. 2001) 36

United States v. Savage,
50 M.J. 244 (C.A.A.F. 1999) 37

United States v. Thomas,
22 M.J. 388 (C.M.A. 1986) 31, 32

United States v. Turner,
25 M.J. 324 (C.M.A. 1987) 8

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 1, 26

U.S. CONST. amend. VI 2, 26

OTHER AUTHORITIES

U.C.M.J. art. 66 ..... 8, 36

R.C.M. 922(c) 11

TO THE HONORABLE, JUDGES OF THE UNITED STATES SUPREME COURT:

The undersigned counsel, on behalf of Edwin A. Ehlers ("Petitioner"), hereby Petitions the United States Supreme Court for a *Writ of Certiorari* in the above captioned matter.

CITATION TO OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS/ORDER

United States v. Ehlers, 2010 CAAF LEXIS 559 (C.A.A.F. June 23, 2010)

United States v. Ehlers, 68 M.J. 338 (C.A.A.F. 2009)

United States v. Ehlers, 2009 CCA LEXIS 229 (N-M.C.C.A., June 30, 2009)

JURISDICTION STATEMENT

Petitioner petitions this Court, pursuant to its rules, within 90 days from the United States Court for the Armed Forces' denial for Request for Reconsideration. The CAAF Order was given on June 23, 2010.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

Bill of Rights, Amendment V, Right to Due Process

> No person shall be held to answer for any capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

> Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Bill of Rights Amendment VI, Right to Compulsory Process and Right to Counsel.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

I. Jurisdictional History.

On 27 April, 17 May, 21 June, 31 July, and 20-21 August 2007, Petitioner was tried by a general court-martial composed of only a military judge at Camp Pendleton, California. The charges and

specifications on which he was arraigned, his pleas, and the findings of the court-martial were as follows:

Chg I: UCMJ Art 125, Spec 1, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, commit sodomy with HS, a child under the age of 12 yrs, by force and w/out consent of said HS. Plea: NG, finding: G.

Chg II: UCMJ Art 134, Spec 1, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, take indecent liberties with HS, a female under 6 yrs of age, not the wife of the said Petitioner, by exposing his penis while masturbating and ejaculating in front of the said HS w/ the intent to gratify the sexual desires of the Petitioner. Plea: NG, finding: G.

Spec 2, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, take indecent liberties with HS, a female under 6 yrs of age, not the wife of the said Petitioner, by slapping her on the buttocks while masturbating w/ the intent to gratify the sexual desires of the Petitioner. Plea: NG, finding: NG*.

---

* Not guilty, but guilty of LIO of assault consummated by a battery, in violation of Article 128, UCMJ; and a Charge of violation of Article 128, UCMJ, guilty, (R. at 378-379.)

Spec 3, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, take indecent liberties with HS, a female under 6 yrs of age, not the wife of the said Petitioner, by inserting his finger into the anus of the said HS w/ the intent to gratify the sexual desires of the Petitioner. Plea: NG, finding: NG#.

Spec 4, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, take indecent liberties with HS, a female under 6 yrs of age, not the wife of the said Petitioner, by pinching the buttocks of the said HS w/ the intent to gratify the sexual desires of the Petitioner. Plea: NG, finding: NG#.

Chg ACI, UCMJ Art 134, Spec 1, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, take indecent liberties with HS, a female under 6 yrs of age, not the wife of the said Petitioner, by exposing pornographic images to the said HS w/ the intent to gratify the sexual desires of the Petitioner. Plea: NG, finding: NG#.

After presentation of the Government's case-in-chief, DDC made a motion for a finding of not guilty of all Charges and specification pursuant to the RCM 917 of reference (a), (R. at 362.) Absent objection by the government counsel, the military judge granted the motion with regard to specification 3 of Charge II, specification 4 of Charge II, and specification 2 of the Second Additional Charge (R. at 365, 367.) After argument by counsel, the military judge also granted the motion with regarding to the Additional Charge and the sole specification thereunder, (R. at 362-367.)

Chg ACII, UCMJ Art 134, Spec 1, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, take indecent liberties with Samuel E. Hester, a male under 16 yrs of age, not the spouse of the said Petitioner, by exposing pornographic images to the said S. E. Hestler w/ intent to appeal to the sexual desires of the Petitioner. Finding: NG.

Spec 2, Summary of Offense: Did, btwn on or abt 1 Aug 02 and on or abt 1 Oct 03, wrongfully communicate to HS, a threat to kick and punch her if she told P. J. Skovranko, Stacy L. Skovranko, Gloria Ehlers, or Randy J. Hester how the Petitioner had touched her. Finding: NG#

On 21 Aug 07 Petitioner was sentenced to confinement for twenty-five (25) years, reduction to E-1, forfeiture of all pay and allowances and a dishonorable discharge. The Convening Authority approved the sentence, except for the discharge, and reduced the sentence to 19 years as a matter of clemency.

II. Facts Adduced for Trial.

Petitioner and his ex-wife Gloria moved to Camp Pendleton, CA in 2001. (R. at 259.) Gloria had two children from a prior relationship, Randi and Samuel Hester, who lived with Petitioner and Gloria. (R. at 260.) At the time of the alleged crimes, Randi and Samuel were about 12 and 8, respectively. (R. at 254.) Petitioner's family became friendly with their neighbors, PR2 Paul Skovranko, USN, his wife Stacy and daughter, HS. (R. at 262.) Petitioner's family moved from their home at Alderwood Drive to

Pinyon Drive in April of 2003. (R. at 264.) Pinyon Drive was a two-floor home. (R. at 264.) In October of 2002, Petitioner baby-sat HS alone in a single-story home. (R. at 316, 326.)

Months after the Skovranko family moved from Pendleton, Gloria's children, who were no longer living with Petitioner, visited the Skovranko home. (R. at 319). At this time, Randi Hester inquired into why HS was scratching her private area and offered to speak with HS privately to help determine the cause of HS's behavior. (R. at 111.) Following this private discussion, Randi informed Mrs. Skovranko that HS had alleged criminal misconduct by Petitioner. (R. at 111, 350.)

The Skovranko's claim they later brought their daughter to the hospital, and eventually involved NCIS[1]. (R. at 309). During this time the child recanted as to the truth of her allegations on multiple occasions. (R. at 114.) After these events, HS was eventually interviewed and video taped concerning the allegations made. (R. at 293.) At this time HS made various facts which contradicted both her later testimony and reality.

---

[1]The Petitioner through Counsel asserts that the conviction based on the facts argued in this pleading is in-of-itself **sufficient to over turn his conviction**. But, it is important to report that further investigation has revealed that the Skorvanko's never brought their child to the hospital as the claim. (Said documentation provided upon request.) It would appear that HS's father perjured himself on the stand. If the case is not remanded for a new trial or simply outright dismissed, Petitioner asserts a *Debuy* hearing should be held on the inconsistencies raised in this Pleading along with the one cited in this footnote.

Following these allegations, NCIS Special Agent ("SA") Eric R. Meulenberg interviewed Petitioner. (R. at 280.) SA Meulenberg testified that during this interview Petitioner stated that once, while masturbating, HS walked in on him and he promptly pushed her out from the room. (R. at 295.) Petitioner denied any form of criminal behavior, and upon realizing the severity of the charges brought against him Petitioner promptly requested to speak with an attorney. (R. at 295.)

HS was eight years old when she testified at trial about sexual abuse that occurred four years prior to trial. (R. at 344, 345.) During her testimony, HS twice stated the factual allegations of the Petitioner's charge, both times in the same words and in the same mechanical order. (R. at 347-348.) No other evidence was offered to support the charges of which Petitioner was convicted. When asked to provide any detail or context to the acts asserted HS repeatedly answered that she could not remember and she did not know. (R. at 351-358.)

Those additional facts necessary for disposition of the questions presented for review before this Honorable Court are discussed below.

ARGUMENT

A. THE EVIDENCE ADDUCED AT TRIAL IS BOTH FACTUALLY AND LEGALLY INSUFFICIENT TO CONVICT PETITIONER OF CHARGES I and II.

The lower appellate courts are required to determine whether the evidence presented at trial is factually sufficient to support a conviction. U.C.M.J. art. 66; United States v. Turner, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of the accuser's guilt beyond a reasonable doubt." Id.

In order to sustain a conviction, the evidence must exclude every rational theory of the case except that of guilt. United States v. Harville, 14 M.J. 270, 271 (C.M.A. 1982). Applying these tests to the facts of this case, this Court should conclude that the evidence in this case is factually insufficient to support the findings of guilty.

The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Given these two standards, the evidence is both legally and factually insufficient to support the findings of guilty in this case. As such, this

Honorable Court should dismiss all charges and specifications.

i. PROSECUTION FAILED TO PROVE THAT PETITIONER SODOMIZED HS.

The evidence adduced at trial by the Prosecution is flimsy at best. There was never any physical evidence that tied Petitioner to the child. The record is absent any semen, blood, or DNA. The prosecution never produced any evidence from Petitioner to be found on HS or her clothes. Instead, it is quite clear that the military judge relied mostly on the poor "testimony" of Petitioner on the stand, the NCIS Investigator's questionable testimony, and an eight-year old's questionable "ancient" memory from several years prior.

NCIS Investigator SA Mulenburg testified that Petitioner admitted to him that he slapped HS's behind while he was masturbating. R. 288. SA Mulenburg also testified that Petitioner told him he had sexual relations with a cousin by the name of Hannah when he was 11 years old. But Petitioner refused to sign a statement reflecting SA Mulenburg's testimony.

SA Mulenburg opined in his 01 AUG 06 NCIS Investigative Report that Petitioner was "deceptive to the relevant questions." See Attachment A. But there are no results from the polygraph or a statement of or video from the interview in the

Record of Trial (hereinafter "ROT").[2] R. 293. Petitioner asserts that he did not admit to NCIS that he molested HS nor had sexual relations with a cousin when he was younger.[3]

Most cases of child molestation require that the parents be first ruled out as possible suspects. But SA Mulenberg acknowledges no other leads were investigated. R. 290-293. The parents (normally the first suspect considered in child molestation cases) was never evaluated by SA Mulenberg.

Contrary to DoDI 6495.02, Sexual Assault Prevention and Response Program Procedures[4], the hospital has no record of HS's alleged visit with her father. Indeed if HS's father had brought her to the hospital for treatment of sexual abuse, said regulations would require them to immediately admit her and notify the authorities. There is no record of such activity occurring.

Petitioner's ex-brother-in-law (from his first marriage) was in the Petitioner's home when the

---

[2]Petitioner had a polygraph conducted at his own expense. (The polygraph is available, unlike the Government's polygraph, upon request.) The polygraph was conducted by an expert in the area regarding polygraph examinations. He opined that Petitioner passed and concluded that he did not commit the crimes for which he had been accused. Several of his colleagues concurred with his conclusion.

[3]Petitioner's mother asserts that Petitioner does not have a cousin or any family member by the name of Hannah. Further, during the ages from 10 to 13, Petitioner never visited with any family member except for his grandparents. See Attachment I.

[4]E3.2.5.2.15.1, E3.2.4, E3.2.5.2.18, E3.2.6, E3.2.7, E3.2.7.1, E3.2.9, E4.3.1, E4.3.2., E5.4.1.

act(s) were said to have taken place. R. 271. and AE 10 pg. 23. A young boy who was babysat along with HS was known to have tried to put his hand down her pants. R. 310-311, 320. NCIS never ruled out any of these other reasonable suspects.

ii. PETITIONER'S TESTIMONY WAS SO VAGUE AND AMBIGUOUS AFTER QUESTIONING BY THE MILITARY JUDGE THAT IT WAS INSUFFICIENT TO CLARIFY PETITIONER'S INNOCENCE.

Petitioner had elected trial by military judge alone, so the military judge was the fact-finder as well as the presiding officer at trial. *See* R.C.M. 922(c). In this case, the military judge also became a second prosecutor, asking questions specifically designed to provide information regarding facts and incidents not covered during direct and cross examination. In response to the judge's questioning regarding the circumstances surrounding Petitioner's statement to NCIS made on 25 May 05, Petitioner testified that he was ordered by his first sergeant to go to the NCIS for questioning, that he signed his waiver forms at the beginning of the interview (which started that morning), and invoked his right to counsel at the end of the interview many hours later. Clearly, Petitioner's testimony hurt him – it was unclear and vague.[5]

The military judge should have delved further into the testimony of Petitioner in order to remove any ambiguity. The questioning by the military

---

[5]Petitioner asserts that this was how DDC instructed him to answer. This compounds the IAC claim in Section IV.

judge never evoked from Petitioner **when exactly** Petitioner determined that he had a right to end the interview – at the beginning when he was clearly under the impression that he was under orders to cooperate or at the end of the interview, after he made potentially damning statements, when he invoked his right to counsel.[6]

Further in the a dual role of trier of fact and prosecution, the results allowed into evidence the necessary statements required to convict Petitioner of the Charges I and II by the MJ allowing this ambiguity. The military judge abandoned his impartial role with regard to Petitioner's testimony when he stepped into the fray on the side of the Government. The military judge's conduct was unjustified, an abuse of discretion, and clearly prejudiced Petitioner.

---

[6]Granted, the testimony was for the limited purposes of suppressing Petitioner's "statements" to SA Mullenberg; but his vague testimony proved to be a bell that cannot be unrung. R. 207-224. The military judge before his ruling noted that he would not consider SA Mullenburg's testimony with regards to Petitioner's request for an attorney during the interview; but before his ruling he made no mention that he would not consider the testimony of Petitioner for his ruling. R. 378.

iii. THE FAULTY FOUNDATION UPON WHICH THIS CASE WAS INITIATED QUESTIONS WHETHER THE LEGAL AND FACTUAL GROUNDS WERE SUFFICIENT TO CONVICT PETITIONER LET ALONE TO BRINGS THIS CASE TO TRIAL.

a. HS's Statements And Actions Before And During Trial Are So Inconsistent That Their Veracity Is Legally And Factually Insufficient To Convict Petitioner.

This Honorable Court cannot truly review this case without looking at the complete picture of how this case came before it. Randi Hestler, a young teenager at the time of the "discovery" of the "incident", told Mrs. Skovranko the next morning that HS had been molested. *See* Randi Hesters' statement given to NCIS on 25 June 04: pg. 2 #7. While trying to elicit from the child what had happened to her, Mrs. Skovranko asked HS "if [Petitioner] did this to her." HS answered affirmatively. *See* Randi Hestler's statement to NCIS 24 june 04; pg 2-3 # 8. While an isolated incident is not necessarily a reason to give pause, a litany of odd behavior is grounds to raise suspicion on other parties.

HS was interviewed by NCIS on or about 09 June 04. The video tape reveals a startling statement from HS. At the end of the interview, she states to the interviewer "I want to thank you for telling me what [Mr. Eddie] did [to me]." See video

at (47 min). CLEARLY THE CHILD HAD BEEN COACHED!

The investigator asked HS if anyone told her what to say; HS hesitated before she answered. HS answered "yes." It is unclear if the investigator clarified the statements let alone if he ever followed up on HS's inconsistency.

Pvt Ehlers' conviction was strongly based on the four-year old testimony of an eight-year old child. Aside from the incredible recollection made by an eight-year old from when she was just the tender age four years of age, HS's testimony was inconsistent with her prior testimony. HS stated in her interview with NCIS that she was assaulted several times in one of the two bathrooms of a two-story home. See video from Exhibit AE XL (1 of 1). But during the time frame of the allegations, Pvt Ehlers was living in a one-story home **where the babysitting and alleged acts occurred!** And when HS was interviewed by Dr. Philip W. Esplin, HS stated that there was only one assault and that it occurred in the second-story bedroom. See video from Exhibit AE XIII (10 of 10). During the trial, HS seemed confused and testified that the incidents occurred in both the bathroom and the bedroom.

HS testified on the stand that the acts occurred on the second-story of Pvt Ehler's home and that her house was right next to Pvt Ehlers' home. R. 350. Recall, Pvt Ehlers only lived in a one-story house when the Ehlers' lived next to the Skovrankos. (Also, Mrs. Skovranko testified that she never left

her daughter alone at the Petitioner's two-story home. R. 326-327.)

HS's testimony changed again when she was on the stand. She stated that Pvt Ehlers did not threaten to kick her or punch her as she had originally stated to the NCIS. R. 356 HS's testimony at trial:

> Q: Mr. Eddie ever say he would kick you?
>
> A: Not that I'm aware of.
>
> Q: Did Mr. Eddie ever say that he would punch you?
>
> A: Not that I'm aware of.

Id. Again, awkward prose for a young person.

A review of the record shows that HS's memory is just not accurate. Granted, Pvt Ehlers was not convicted of the charge to threaten HS but this testimony as well as other testimonies provided by her and other witnesses cast serious doubt as to whether any conviction should stand against Pvt Ehlers.

HS's testimony was further contradicted by the testimony of Gloria Ehlers. HS stated that Gloria Ehlers walked in on them during one of the assaults. *See* NCIS's result of forensic interview of HS 15 JUN 04: AE 7, pg. 11, paragraph 9. But Gloria Ehlers stated under oath that she never walked in on HS and Pvt Ehlers doing anything inappropriate. R. 269-270. HS's testimony is not the only suspicious portion of the Government's case.

HS's actions do not coincide with the allegation that Pvt Ehlers harmed her. HS's testimony reflects that when someone puts their hand down her pants she would scream. *See* Stacy Skovranko's NCIS statement: AE 10, pg. 23, second full paragraph). Clearly, HS knew that it was not right for someone to touch her in her private areas. HS knew to respond when she was being touched inappropriately.

But HS did not testify that she screamed when she asserted Petitioner allegedly touched her. Ms. Donna Kerr was allegedly in the home when this event occurred. R. 325. and AE X at pg. 23, first full paragraph. The record does not reflect that she heard anything from HS when the incident(s) occurred. Also, there was no testimony from any neighbor that they heard a child screaming on the day(s) in question. The child's testimony is simply not reliable.

b. RP2 Paul Skovranko's Statements And Actions Before And During Trial Are So Inconsistent That Their Veracity Is Deficient To Be Legally And Factually Sufficient To Convict Petitioner.

RP2 Skovranko's heart-wrenching testimony included how he took his daughter to the hospital on 02 JUNE 04 and how he had to undergo therapy because of how his daughter had been harmed. It is contrary to Department of Defense regulation to turn a child away who comes to a military hospital with a statement of being sexually assaulted. See DoDI 6495.02 Sexual Assault Prevention and Response Program Procedures sections: E3.2.5.2.15.1, E3.2.4, E3.2.5.2.18, E3.2.6, E3.2.7, E3.2.7.1, E3.2.9, E4.3.1, E4.3.2., E5.4.1.

The Skovrankos went to NCIS the next day to start the investigation; this testimony is suspicious because it is contrary to military regulation. If HS was brought to the hospital with a complaint of a sexual attack, the hospital would have kept her and would have also contacted NCIS – not release them and have them proactively contact NCIS.

The Skovrankos who were so adamantly upset over their daughter being molested never testified that they noticed blood coming from the child, blood or semen on her clothing, or anything unusual right after the alleged incident(s) occurred. (It is not uncommon for a child to be touching themselves as they learn about their body.) The family's testimony

is simply not reliable (Recall, Mrs. Skovranko's testimony at trial was impeached. R. 322-328). Further, the Skovrankos have motive for not wanting the investigation (and trial) examining their family.

The Skovrankos have everything to gain by being less-than-honest at trial (and during the course of the investigation). By keeping the husband out of jail, they keep the family unit together (albeit dysfunctional) and continue to receive military pay, benefits, and privileges. The Skovranko's inconsistent testimony reflects reasonable doubt for Petitioner. Their motive only bolsters reasonable doubt for Petitioner.

iv. PROSECUTION FAILED TO PROVE THAT PETITIONER FORMED THE INTENT GRATIFY THE SEXUAL DESIRES OF THE PETITIONER IN THE COURSE OF CHARGE II AND ITS TWO SPECIFICATIONS.

The taking of indecent liberties with a child is a general article under UCMJ. Article 134 requires that the element of "intent to gratify the sexual desires" of the accused be proven in order for a conviction. The ROT is void of any suggestion that when HS caught Petitioner masturbating that the situation occurred in order to arouse Petitioner's interests.

The ROT reflects that HS walked in on Petitioner. HS was not brought into the room. HS was not called for by the Petitioner. Further, it is unclear how close Petitioner was to finishing when

she walked in on him; the inevitable may not have been easily avoided. (Anyone who is caught masturbating would be surprised and not necessarily sure what to do.)

There is simply no evidence that the situation was designed to satisfy Petitioner's sexual desires. Assuming *arguendo* if Petitioner got caught masturbating, it would be an embarrassing moment for anyone. (Especially for someone who does not have young children of their own.) It is obvious that Petitioner simply did not know what to do.

Specification 2 of Charge II, the taking of incident liberties by slapping HS's bottom while masturbating, was reduced to assault consummated by a battery, in violation of Art. 126, UCMJ. As discussed above, Petitioner was simply walked in on while masturbating. See AE VII at 15. Any one of us would be embarrassed by that act, let alone if we were walked in on by a minor child. SA Mulenburg acknowledged that Petitioner informed him that he was just trying to get the child out of the room. R. 300. The charge was reduced clearly because the intent to satisfy Petitioner's sexual desires was not there (as Petitioner also asserts regarding the other Charge and other Specification). Not only should the second specification of the Second Charge have been reduced but it should have been dismissed, as well as the sole specification of Charge I and the first specification of Charge II.

There was no intent to satisfy the sexual desires of Petitioner in either specification. When Petitioner slapped HS's behind, it was not done

repeatedly nor was it prolonged. Clearly, it was a means to shoo her out of the room. Petitioner did not continuously touch HS. She was not posed in a sexual position nor was she talked to in a "dirty" way. The term "slapped" is simply misleading. Petitioner did not put his hand down her pants. His hands never touched HS's bare behind. Further, it is unclear how this incident reached the level of the LIO.

The elements for assault consummated by a battery, Article 128, UCMJ, is defined as (1) the accused did bodily harm to a certain person; and (2) that the bodily harm was done with unlawful force or violence. There was no bodily harm to HS when Petitioner made contact with her behind. The record does not reflect that she needed to go to the hospital, that she was unable to sit for period of time, or that she even said "ouch". Given that no actual harm occurred to HS, no one could reasonably conclude that Petitioner committed bodily harm to HS and the record is void of any showing of unlawful force or violence.

Petitioner was not convicted beyond a reasonable doubt, Charges I and II and their specifications should be dismissed. Petitioner was not convicted beyond a reasonable doubt but instead convicted on the emotional weight of the charges itself. The military judge, the prosecution, NCIS, and the detailed defense counsel (hereinafter "DDC") all failed to consider every reasonable theory of the case **except for only** Petitioner's guilt.

B. PETITIONER WAS PREJUDICED BEFORE AND DURING THE TRIAL BY THE MILITARY'S MISCONDUCT.

i. PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE GOVERNMENT DETAILED DEFENSE COUNSEL'S FAILURE TO ZEALOUSLY DEFEND PETITIONER.

Petitioner was denied the effective assistance of counsel by his original detailed defense counsel ("DDC"), LT Michael Melocowski and LT S. P. Gonzales. Petitioner acknowledges that he has to overcome a strong presumption that his counsel was competent. *See* United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004). However, it is clear that Petitioner's DDC's performance before and during trial was below the requirements set out by the Strickland test: First that the detailed counsel's performance was deficient. And second, said deficiency of detailed counsel prejudiced the Petitioner's ability to get a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); United States v. Edmond, 63 M.J. 343 (C.A.A.F. 2006). Petitioner recognizes that his appointed detailed counsel need not consult with him regarding every trial strategy. However, this does not relieve detailed counsel from his obligation to consult with him regarding important decisions and questions of overarching trial strategy. Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) (internal quotations and citations omitted).

In United States v. Grigoruk, the defendant had been convicted of rape, sodomy, and indecent acts with a child under the age of 16. United States v. Grigoruk, 52 M.J. 312 at 313 (2000). The defendant raised on appeal that he was denied a effective assistance of counsel. The defendant argued that his defense counsel failed "to call an expert witness who would provide credible evidence that supported the Defense's theory of the case." Id.

"[Grigoruk] was a classic credibility contest between [defendant] and [the accuser]." Grigoruk at 315. The accuser was a nine year old female who accused the defendant of sexually abusing her between the ages of 4 and 8. Id. at 313. There were no witnesses to this incidents. Nor was there any physical evidence to support the accuser's claims – medical professionals could find no physical harm to the accuser. Id. at 314.

Further, the mother and the defendant were going through a contentious divorce at the time. Id. at 313. The mother had also been told that if she could not substantiate her claims that the accuser would be taken away from her by child welfare services. Id. at 314. And "[a]fter being advised that it would be in his best interest to cooperate with the investigation, [Defendant] said, 'I guess all I can do is try to plea bargain.'" But the statement was not memorialized by the accused. Id. at 314. "Petitioner testified in his own defense and categorically denied the allegations." Id.

Following the test outlined in Strickland, the Court of Appeals for the Armed Forces ("CAAF")

adopted the following test to determine whether an Petitioner has defeated the presumption of competence for a defense counsel:

> (1) Are Petitioner's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and
>
> (3) If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Id. at 315 *citing* United States v. Polk, 32 M.J. 150, 153 (1991). CAAF does not like to "second-guess" a counsel's strategy nor generally should this Court. But when it is not clear if a strategy or a tactical decision has come into play, counsel may be called on to explain himself.

CAAF determined that military criminal appellate courts have the power to examine defense counsel's actions. A military criminal appellate court can ". . . [review] the allegations of ineffectiveness and the government response, [examine] the record, and [determine] that the

allegation and the record contain evidence which, if unrebutted, would overcome the presumption of competence." Id. at 315 *citing* United States v. Lewis, 42 M.J. 1, 6 (1995).

The Grigoruk Court determined that the defendant meet the prior test. The Court noted that this was a "credibility contest" between the defendant and the accuser. The defense counsel prevailed over a contested motion to obtain the expert witness. "Inexplicably, however, defense counsel did not call the expert or any other expert to challenge DW's credibility. We hold that Petitioner has met the Lewis threshold for compelling defense counsel to explain his actions." Id. at 315 *referencing* United States v. Clark, 49 M.J. 98 (1998) (failure to call accident-reconstruction expert was ineffective representation).

In the case at bar, the attorney-client relationship among Petitioner and his DDC was prefaced with foreboding. Petitioner asserts that LT. Melocowsky did not want to represent him. Petitioner even tried to have him removed as counsel but was denied. While military detailed defense counsel do not always get to pick their clients, this does help set the stage for deficient representation for the Petitioner.

LT Gonzales had been informed by Mrs. Angela Ehlers that there was someone else in the house during the charges of timeframe. She informed counsel that Petitioner's ex-brother-in-law stayed with Petitioner and his ex-wife, Gloria Ehlers, from time-to-time. She also informed LT

Gonzales that the ex-brother-in-law allegedly had a conviction for child abuse. LT Gonzales told Mrs. Ehlers that he would follow up on this but nothing was brought up at trial.

Child abuse expert, Dr. Philip W. Esplin, was obtained with great effort by the defense to assist Petitioner. R. 144-200 Dr. Esplin interviewed HS and was prepared to testify at trial. But he was not brought forth by DDC. The "strategy" significantly undermined Petitioner's defense.

Like in Grigoruk, this case was a credibility contest between Petitioner and Ms. Skorvanko. Like in Grigoruk, the accuser was eight years of age recalling an event(s) that occurred four years earlier in her childhood. Like in Grigoruk, there was no memorization of a "confession" from Petitioner nor was there a video or copy of the government's polygraph. Petitioner like the Defendant in Grigoruk maintained his innocence.

The DDC battled with the prosecution to get Dr. Esplin as an expert for the defense. R. 144-200. The expert was to assist the trier of fact with how Ms. Skorvanko's behavior did not coincide with that of a rape victim. See AE XXIV. DDC won the right to obtain the expert for Petitioner's defense. But he was never brought forth to trial. LT Melocowski only told Mrs. Ehlers that Dr. Esplin had left town.

Dr. Esplin's testimony was detrimental to Petitioner's defense. Dr. Esplin could have explained to the military judge how Ms. Skorvanko's prior interviews, prior behavior, and her current

testimony was inconsistent to that of someone who has been abused. The expert could have testified about how Ms. Skorvanko's testimony may have been possibly coached. He could have tilted the scales of credibility in Petitioner's favor. But Dr. Esplin's testimony in-of-itself was not the only benefit for the Petitioner.

By not bringing Dr. Esplin to the stand, HS's first forensic video was not brought into evidence. As discussed above, it is this video that starts a cascade of problems with the Government's case. It questions whether HS had been coached from the beginning. This raises reasonable doubt for the Petitioner. Petitioner asserts that if not but for DDC's deficiency, he would not have been convicted.[7]

ii. THE GOVERNMENT INTERFERED WITH THE PETITIONER'S DEFENSE AND AS A RESULT, PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

Petitioner asserts that the Prosecution's conduct leading up to and during the trial was a thinly veiled attempt to interfere with his defense. This interference deprived Petitioner of his Fifth Amendment Right to Due Process and Sixth Amendment Right to Compulsory Process. CAAF

---

[7]DDCs' malaise is further questioned for their inefficiency in producing the ROT. The ROT was originally sent to them even after civilian defense counsel (*hereinafter* "CDC") announced himself as lead counsel to the SJA. When the ROT disappeared, CDC had to intervene in order to find it and obtain the ROT from SJA. CDC is still unaware what DDC did with their copy of ROT.

recently reiterated the appropriate standard of review in United States v. Edmond, 63 M.J. 343, 2006 CAAF LEXIS 1053.[8]

> In a due process analysis of prosecutorial misconduct this court looks at the fairness of the trial and not the culpability of the prosecutor. See Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed 2d 78 (1982). Even where we find misconduct on the part of the prosecutor, this court will go on to look at the "overall effect of counsel's conduct on the trial, and not counsel's blameworthiness." United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F 2003).

Edmond at 345.

In Edmond, the Defendant was convicted on various charges. Id. at 346. The Defendant had called a witness whose testimony could have helped with his defense. The Prosecutor upon hearing the witness' proposed testimony informed the Witness that if he testified he would be prosecuted for perjury by the Special Assistant US Attorney (who happened to be part of this conversation) because he knew he was lying. Id. The witness decided not to

---

[8]In Edmond, CAAF granted a review of defendant's appeal. The Court agreed to hear defendant's petition on the issues of witness interference by the prosecution. Edmond at 345. But the Court determined that a DuBay hearing was necessary in order to develop more facts on the issue.

testify and left the courthouse without informing the defense.

The Court of Appeals for the Armed Forces (*hereinafter* "CAAF") refers to the U.S. Court of Appeals for the Ninth Circuit in a similar situation. "The court concluded that 'the additional statement served as no more than a **thinly veiled** attempt to coerce a witness of the stand." Id. at 349 *citing* Vavages, 151 F.3d at 1190 (Emphasis Added). The Court determined that the Government substantially interfered with the Witness from testifying at Defendant's trial.[9]

CAAF then proceeded to the element of prejudice, if any, upon the Defendant. "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." Edmond at 350 *citing* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). But the court determined that in order to conduct a proper analysis of potential prejudice, the court needs to examine DDC's actions. The court recognized that the prosecutor's conduct was "closely intertwined" with the DDC's conduct. DDC failed "to talk with a potential exculpatory defense witness [i.e., the Witness] before agreeing to release the witness [who had been properly subpoenaed]." Edmond at 350.

---

[9]CAAF noted that "[s]everal legal norms are violated when a trial counsel attempts to or unlawfully dissuades a defense witness from testifying at a court-martial" Edmond at 349 *citing* Meed, 44 M.J. at 5.

The court concluded that if not but for the ineffective assistance of counsel (hereinafter "IAC") of DDC, the panel would have heard the potential exculpatory testimony of the witness. (The prosecutor appears to be unscathed from any direct admonishment from the Court.) The court concluded that there would have been reasonable doubt raised in the panel members' deliberations. The court set aside the guilty findings of the relevant charges.

In the case *sub judice*, a member of the prosecution, CPT Ellis, contacted two of Petitioner's potential witnesses. CPT Ellis identified himself to these potential witnesses, one of whom is the current wife of Petitioner, as a member of the defense team. He informed them that the Petitioner confessed to all of the charges. Neither witness believed him and when they called him to task, CPT Ellis then identified himself with the prosecution and quickly ended the call.[10]

Petitioner acknowledges that the potential witnesses were not deterred by the prosecution's calculated actions.[11] But these inappropriate actions cause the Petitioner to give pause as to what other potential defense witnesses were interfered with (along with the Government's failure to pursue other possible suspects, *as discussed above*). Further, it

---

[10]Angela J. Robbins filed a complaint against Capt. Ellis with the JAG several weeks before the trial. JAG Reg INST 5803.1.C requires the JAG to investigate this misconduct. It is our understanding that JAG still has not acted on this complaint.

[11]Although they now have a great distrust in the military and its fairness with regards to the judicial process.

denies Petitioner, his family, and the public that the military judicial process will provide him with a fair trail. At minimum, a DuBay hearing should be held to investigate the Government's conduct.[12]

The overall issues of prosecutorial misconduct is compounded by a recent discovery regarding Assistant Trial Counsel Major Plummer. An inquiry by Mrs. Ehlers to the JAG revealed that Major Plummer is only licensed in Indiana. Mrs. Ehlers pursuit of this inquiry led her to discover that Major Plummer has been suspended from the practice of law since 2002. JAG regulations require that any JAG Officer be in "good standing" in at least one state bar. See JAG Instruction 5803.2. Major Plummer is not in good standing with the Indiana Bar.[13]

Major Plummer asserted to the trial court that he was qualified to serve as a prosecuting attorney before the trial court.[14] R. 239-240. Major Plummer also asserted that he had not acted in a disqualifying manner contrary to the fact that he

---

[12]Like the DDC in Edmond, the DDC for the case at bar did not pursue several other reasonable defenses. These defenses, as discussed in Section I, *supra.*, would have led to reasonable doubt in the mind of the trier of fact. A DuBay hearing should be conducted to determine if the DDC's failure to pursue these other issues rise to IAC. Only **then** can it truly be certain if Petitioner was prejudiced by DDC's actions.

[13]Major Plummer's license is "suspended" not "inactive". Under these conditions, he cannot obtain a letter in good standing with the Indiana Bar as required by the JAG Instructions.

[14]Also at the time of trial, Major Plummer was the Officer in Charge of Legal Service Support Team Delta.

was not in good standing with the Indiana State Bar. This is also contrary to his Oath under UCMJ Article 42 to perform his duties faithfully. Mrs. Ehlers' "discovery" bolster's Petitioner's claims of prosecutorial misconduct (not only for his case but also for those prior cases Major Plummer has touched since his license was suspended). Overall, the veracity of the prosecution cannot be trusted.

iii. PETITIONER WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTION'S ACTS OF UNLAWFUL COMMAND INFLUENCE.

"Unlawful Command Influence (*hereinafter* "UCI") is '*the mortal enemy of military justice.*'" United States v. Lewis, 63 M.J. 405, 406 (2006) *citing* United States v. Gore, 60 M.J. 178, 178 (C.A.A.F. 2004) (*quoting* United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)) (emphasis added). An Petitioner must meet the following steps in order to successfully raise the issue of UCI:

> "[T]he defense has the initial burden of raising the issue of [UCI]." At trial, the defense meets its burden by showing "facts which, if true, constitute [UCI], and that the alleged [UCI] has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999) (*quoting* Biagase, 50 M.J. at 150). A similar burden exists for the defense on appeal where the defense raises [UCI] by showing:

1. facts which, if true, constitute [UCI];

2. . . . that the proceedings were unfair; and

3. . . . that [UCI] was the cause of the unfairness.'

Id. at 413. Once the Defendant successfully raises UCI, the Government has to "prove beyond a reasonable doubt either that there was no UCI or that the proceedings were untainted. . . ." Id. CAAF has recognized that such a high burden upon the Government is necessary. "This burden is high because "'command influence tends to deprive service members of their constitutional rights."'" Id. at 707 *citing* Gore, 60 M.J. at 185 (*quoting* Thomas, 22 M.J. at 393).

In Lewis, the defendant appealed his decision based on UCI. Trial Counsel ("TC") *voir dired* the Military Judge (*hereinafter* "MJ") about her relationship with the female civilian defense counsel. Lewis at 407. TC moved to have MJ removed from trial for cause. Id. at 407–409. He asserted MJ's casual relationship with civilian counsel prejudiced the proceedings. The MJ denied TC's motion. Id. at 409.

TC made a written appeal of the MJ's ruling. Id. In his appeal, TC implied a homosexual relationship between MJ and the civilian counsel. Id. This allegation had not been brought up at trial. Eventually, the original detailed MJ recused herself; she found herself second guessing ever step and was

too emotional given the outrageous accusations made by TC (with the assistance of the Staff Judge Advocate [*hereinafter* "SJA"). Id. at 411. The second MJ recused himself also – he too was so disgusted with the behavior of the prosecution and the SJA. The third MJ recognized the problem of UCI and made some concessions regarding defense's request for a change of venue. Id. at 411-412. The third MJ also gave orders that the SJA was not to enter the courtroom for defendant's trial. Id. at 411. But TC was not removed. The prosecuting attorney and SJA apparently had not been punished for their behavior.[15] Id. at 416, Footnote 4.

The defendant pled guilty to the charges. Id. at 411-412. On appeal, the defendant argued that his case was tainted by UCI. Id. at 412. The defendant asserted that the calculated actions of the prosecution and the SJA to wrongfully remove a qualified, detailed MJ to his case constituted UCI. Id.

Lewis argued that *serious doubt about the fairness of the military justice system* has been raised by the prosecution's outrageous conduct. Id. It would appear to the public that the prosecution can manipulate the parties at a court-martial. He asserted that this error was not harmless beyond a reasonable doubt. The prosecution should not be rewarded for its unethical actions. CAAF agreed.

---

[15]CAAF sent this case back to the Clerk of Court with directions to forward this ruling to the appropriate officials for investigation of TC and SJA. Id. at 416, Footnote 4.

CAAF held that UCI is not just an issue of resolving actual UCI but also the cleansing of any perceived UCI. Id. at 413. The opinion from CAAF stated: "Major CW's recusal was the result of an unlawful effort to unseat an otherwise properly detailed and qualified military judge." Id. at 414. CAAF noted:

> Congress and this court are concerned not only with eliminating actual UCI, but also with "eliminating even the appearance of UCI at courts-martial." United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979). "[O]nce [UCI] is raised, 'we believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.'" Stoneman, 57 M.J. at 42 (*quoting* Rosser, 6 M.J. at 271). This call to maintain the public's confidence that military justice is free from [UCI] follows from the fact that even the "'appearance of [UCI] is as devastating to the military justice system as the actual manipulation of any given trial.'"Simpson, 58 M.J. at 374 (*quoting* Stoneman, 57 M.J. at 42-43). Thus, "disposition of an issue of [UCI] falls short if it fails to take into consideration . . . **the appearance** of UCI at courts-martial." Id.

Id. at 415 (Emphasis Added). But the effects of UCI was not cured beyond a reasonable doubt by the remedial actions in Lewis' trial. Id. at 414-415.

CAAF in Lewis determined that the perception of the UCI could not be cured. The calculated actions of the Government to remove the first MJ would always be an albatross for Lewis' trial. "Thus, the appearance of [UCI] will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." Id. at 415. The only effective remedy, albeit drastic, is to dismiss the charges against Lewis with prejudice: "Dismissal of charges with prejudice . . . is an appropriate remedy where the error cannot be rendered harmless." Id. at 416 citing Gore, 60 M.J. at 189. For the reasons stated in subsection B, *supra.*, Petitioner asserts that the Prosecution has committed UCI.

The prosecution's actions are solely inappropriate and go outside the boundary of the American Bar Association's Model Rules of Professional Conduct, let alone the good conduct of any military officer. The Prosecutions' actions were calculated when it attempted to mislead potential witnesses in Petitioner's case. It cast serious doubt on the fairness of Petitioner's case to **any observer**. Like in Lewis, the Prosecution's inappropriate behavior cannot be cured by setting aside the decision and ordering a new trial. The Petitioner's witnesses will forever be tainted by the Prosecution's misconduct.

C. CHARGES I AND II AND ADDITIONAL CHARGES I AND II AND ALL OF THEIR SPECIFICATIONS CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.

"[T]he principle prohibiting unreasonable multiplication of charges is one that is well established in the history of military law . . . ." United States v. Quiroz, 55 M.J. 334, 336-37 (C.A.A.F. 2001) (*quoting* United States v. Quiroz, 53 M.J. 600, 605 (N-M. Ct. Crim. App. 2000)). The prohibition against unreasonable multiplication of charges ("UMC") addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. Id. at 337.

CAAF approved the non-exclusive list of factors the Navy-Marine Court considered in determining if there was a piling on of charges and if that piling on was so extreme or unreasonable as to necessitate relief under the Court's Article 66(c), UCMJ authority. 55 M.J. at 339.

Applying the *Quiroz* factors to the facts of this case, it is clear that Charge I, Specifications 1, 2, 3, and 4 of Charge II, Additional Charge I, and Specification 2 of Additional Charge II represent an unreasonable multiplication of charges. While Petitioner concedes that his counsel did not raise the appropriate objection at trial, all other Quiroz factors are satisfied in Petitioner's favor and in the true nature of this Court's Article 66(c) powers, relief is appropriate.

As to the second Quiroz factor, it is abundantly clear that the specifications are aimed at the same act: Indecent liberties with a child under the age of 12. The Government in its pursuit of a conviction (in its own uncertainty) cast the same large time-frame for all of its Charges against Petitioner. The Government was not able to prove with any certainty whether the acts were separate events or were part of a course of action in one moment in time.

This over charging by the Government, based on the single act of misconduct, i.e., the alleged abuse of HS misrepresents Petitioner's actions and unreasonably exaggerates his criminality in this case, as discussed in the third Quiroz factor.

The Government also unreasonably increased the Petitioner's punitive exposure. A court is limited in the amount of punishment it may assess; "a convicted service member has a right not to carry on his record [two] convictions for what is essentially a single offense." United States v. Nelson, 2003 CCA LEXIS 249 (A.F. Ct. Crim. App. 2003)(*citing* United States v. Savage, 50 M.J. 244 (C.A.A.F. 1999); United States v. Britton, 47 M.J. 195, 202 (C.A.A.F. 1997)).

Petitioner was clearly prejudiced in that he received two additional convictions that he should not have otherwise received. *See* United States v. Frelix-Vann, 55 M.J. 329, 333 (C.A.A.F. 2001) (*citing*, United States v. Ball, 470 U.S. 856, 864-65 (1985) ("the second conviction, even if it results in no greater sentence, is an impermissible

punishment.")). Petitioner faced **life without parole plus 42 years in prison** had he been convicted of all of the Charges and their Specifications. Petitioner's conduct should have been charged in one specification stating that he (may have) engaged in indecent liberties with HS.

Lastly, Petitioner contends that the facts outlined above concerning the second, third, and fourth Quiroz factors, when viewed under a totality of the circumstances, demonstrate prosecutorial overreaching in this case, as he faced additional exposure for a single act. Petitioner's assertion is bolstered by the motions made after the Government presented its case-in-chief. The defense moved (and was granted) without objection by the Government, for a finding of not-guilty with regard to Specification 3 of Charge II, specification 4 of Charge II, and specification 2 of the Second charge. See Footnote #, *supra*.

The Government's acquiescence appears to reflect that the Government was aware of its weak case and its own overreaching. The defense also moved (and was granted) with objection by the Government, for a finding of not-guilty with regard Specifications 3 and 4 of Charge II, Additional Charge I and its sole specification, Specification 1 and 2 of the Additional Charge II. R. 367. Again, a reflection that the Government's case was ill-founded.

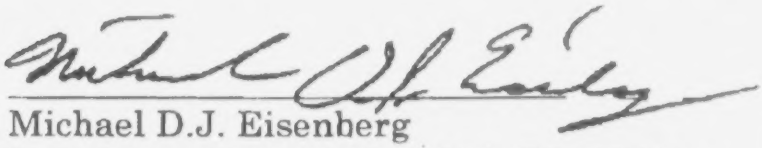
The facts of Petitioner's case satisfy the *Quiroz* factors. The basis for the specifications, as outlined by the Government's own evidence, was but

a single, isolated act. "What was substantially one transaction was unreasonably multiplied into [two] offenses, in violation of the well-established principle in military law against unreasonable multiplication of charges." United States v. Carpenter, No. 20020894 (A. Ct. Crim. App. June 22, 2004) (unpub.)(Appendix).

CONCLUSION

WHEREFORE, for all the reasons stated above, the Petitioner respectfully requests that the United States Supreme Court, Grant *Certiorari*.

Respectfully Submitted,



Michael D.J. Eisenberg
LAW OFFICE OF MICHAEL D.J. EISENBERG
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 558-6371
Michael@Eisenberg-Lawoffice.com

Counsel for Petitioner

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Order of the
The United States Court of Appeals
For the Armed Forces
Re: Denying Petition for Review
entered April 23, 2010 ..... 1a

Opinion of the
The United States Navy-Marine Corps
Court of Criminal Appeals
entered June 30, 2009 ..... 3a

Order of the
The United States Court of Appeals
For the Armed Forces
Re: Denying Petition for Reconsideration
entered June 23, 2010 ..... 25a

[ENTERED: April 23, 2010]

United States Court of Appeals
for the Armed Forces
Washington, D.C.

USCA Misc. Dkt. No. 10-0039/MC
Crim. App. Dkt. No. 200800190

UNITED STATES,

Appellee

v.

Edwin A.
EHLERS,

Appellant

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is by the Court this 23rd day of April 2010,

ORDERED:

That said petition be, and the same is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (EISENBERG, Esq.)
Appellate Government Counsel (ECKERT)

[ENTERED: JUNE 30, 2009]

UNITED STATES OF AMERICA v. EDWIN A. EHLERS II, SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800190

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2009 CCA LEXIS 229

June 30, 2009, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Motion granted by *United States v. Ehlers, 2009 CAAF LEXIS 1093 (C.A.A.F., Sept. 29, 2009)*

PRIOR HISTORY: [*1]

GENERAL COURT-MARTIAL. Sentence Adjudged 21 August 2007. Military Judge: Maj Brian Kasprzyk, USMC. Convening Authority: Commanding General, 1st Marine Division (REIN), Camp Pendleton, CA. Staff Judge Advocate's Recommendation: LtCol R.M. Miller, USMC.

CASE SUMMARY:

PROCEDURAL POSTURE: A military judge, sitting as a general court-martial, convicted appellant

servicemember of sodomy with a child under the age of 12 years, assault consummated by a battery upon a child under the age of 16 years, and taking indecent liberties with a child under the age of 16 years, in violation of Unif. Code Mil. Justice (UCMJ) arts. 125, 128, and 134, *10 U.S.C.S. §§ 925*, *928*, and *934*. The servicemember appealed and filed a motion for a new trial.

OVERVIEW: The servicemember was charged with violating UCMJ arts. 125, 128, and 134 after a child (victim) told the servicemember's former stepdaughter that the servicemember sexually abused her when she was four years old and the servicemember told a military investigator that he looked at pornography, masturbated while the victim was present, and spanked the victim while he masturbated. The victim testified at the servicemember's trial when she was eight years old, and a military judge convicted the servicemember of all charges and sentenced him to a dishonorable discharge, confinement for 25 years, total forfeitures, and reduction to E-1. Although the convening authority approved the findings, he disapproved all confinement in excess of 19 years as an act of clemency. The court of criminal appeals found that specifications alleging that the servicemember committed sodomy and indecent acts with a child were not multiplicious and the evidence was sufficient to sustain the findings of guilty to both offenses. The court also found that there was no merit to the servicemember's claim that he was denied effective assistance of counsel and that his sentence was too severe.

OUTCOME: The court of criminal appeals denied the servicemember's petition for a new trial, and affirmed the findings and sentence that was approved by the convening authority.

LexisNexis(R) Headnotes

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN1] The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that a military court of criminal appeals did not see or hear the witnesses, the court of criminal appeals is convinced of the appellant's guilt beyond a reasonable doubt.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process
Military & Veterans Law > Military Justice > Judges
[HN2] It is a basic right of military due process to have a judge who appears impartial throughout an accused's court-martial. It has long been the law that a military judge may question witnesses. A military judge does not abandon his impartiality by asking appropriate questions to clarify factual uncertain-

ties. Indeed, military judges have wide latitude to ask questions, including questions which might adversely affect one party or another.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt
Military & Veterans Law > Military Justice > Trials > Burdens of Proof
[HN3] In a trial by court-martial, proof beyond a reasonable doubt does not require that the evidence be free from conflict.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
Criminal Law & Procedure > Accusatory Instruments > Multiplicity > Definition
Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Tests
Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
[HN4] Multiplicity, a constitutional violation under the *Double Jeopardy Clause*, occurs if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
Military & Veterans Law > Military Justice > Appeals & Reviews > New Trials
[HN5] A new trial shall not be granted on the basis of newly discovered evidence unless the petition

demonstrates that (1) the evidence was discovered after the trial, (2) the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence, and (3) the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a more favorable result for the accused. R.C.M. 1210(f)(2), Manual Courts-Martial.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
Military & Veterans Law > Military Justice > Appeals & Reviews > New Trials
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
[HN6] Requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored in the military justice system. Relief is granted only if a manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence. The denial of an appellant's request for a new trial based on newly discovered evidence is not an abuse of discretion where the evidence did not offer some new version of the facts presented at trial and where additional impeachment material and potential perjury by witnesses would probably not have produced a substantially more favorable result for the accused.

COUNSEL: For Appellant: Mr. Michael Eisenberg, Esq.; LT Sarah Harris, JAGC, USN.

For Appellee: Capt Robert Eckert, USMC; LT Elliot Oxman, JAGC, USN.

JUDGES: Before D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM, Appellate Military Judges. Chief Judge O'TOOLE concurs. MAKSYM, Judge (dissenting in part, and concurring in part).

OPINION BY: V.S. COUCH

OPINION

OPINION OF THE COURT

COUCH, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of sodomy with a child under the age of 12 years, assault consummated by a battery upon a child under 16 years, and indecent liberties with a child under the age of 16 years, in violation of Articles 125, 128, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 925*, *928*, and *934*.[1] The appellant was sentenced to confinement for 25 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings and the sentence, **[*2]** but disapproved all confinement in excess of 19 years in an act of clemency.

The appellant alleges five assignments of error: (1) that the evidence is legally and factually insuffi-

---

[1] The offenses occurred prior to October 2007, and are therefore unaffected by the amendment of Article 120, UCMJ, that now encompasses sexual offenses involving children.

cient to support the findings of guilty to sodomy and indecent liberties with a child; (2) that the appellant "was prejudiced before and during the trial by the military's misconduct" in the form of ineffective assistance of counsel, prosecutorial misconduct, and unlawful command influence; (3) that the offenses alleged constitute an unreasonable multiplication of charges; (4) that the sodomy, assault, and indecent liberties charges are multiplicious; and (5) that the appellant's adjudged sentence of confinement for 25 years is "unduly disproportionate." After considering the record, the appellant's briefs and assignments of error, the appellant's *pro se* petition for a new trial, the Government's responses, and the affidavits of the trial and detailed defense counsel which are attached to the record, we conclude that the findings and the sentence **[*3]** are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ*. The appellant's petition for a new trial is denied. RULE FOR COURTS-MARTIAL 1210(g)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Background

While assigned to Camp Pendleton, California, the appellant and his family became friends with their next door neighbors, Petty Officer Second Class [S] and his family, including their four year-old daughter, HS. The two families were close, and their children played and spent time together at each family's house. The appellant's former spouse, Gloria, testified that she occasionally babysat the [S]

family children in her home, sometimes in the company of the appellant.

At the time of the alleged offenses, Gloria testified that the appellant routinely viewed pornography from the internet, and maintained a collection of pornography consisting of three digital video disks (DVDs). Gloria further testified that in August 2002, she underwent a hysterectomy and, as a result, experienced a lack of sexual drive and mood swings, which affected the marital relationship between her and the appellant. **[*4]** The couple separated in April 2004, and subsequently divorced.

While living next door to the [S] family, the appellant babysat for HS on at least one occasion while her father was on deployment and her mother was sick as a result of a pregnancy. Record at 316. HS testified that the appellant masturbated in her presence, and spanked her on the buttocks with his hand.[2] *Id.* at 348. HS also testified that the appellant put "a type of lotion on his hand," put his penis into her mouth, and that later "white stuff came out." *Id.* HS testified that she was afraid to tell anybody about the incident because the appellant told her if she did, her "parents won't love me." *Id.*

HS's parents testified that she occasionally rubbed her genitals very hard. After the [S] family moved to Parris Island, South Carolina in late 2003, the appellant's former stepdaughter, RH, visited during her summer vacation. HS's parents men-

---

[2] HS was four years old when the appellant's offenses occurred, and eight years old when she testified at trial.

tioned HS's behavior to RH, who in turn spoke to HS. During this conversation, HS said that she had been sexually abused by the appellant. HS's parents related these allegations **[*5]** to medical care providers, and later to agents of the Naval Criminal Investigative Service (NCIS).

Towards the end of the NCIS investigation, Special Agent (SA) Eric Meulenberg interviewed the appellant. The appellant admitted to viewing pornography and masturbating to ejaculation in the presence of HS, and to spanking her on the buttocks while in the process of this sexual activity. *Id.* at 287-88. The appellant also admitted that HS watched him while he masturbated, and drew a diagram of his living quarters to indicate where HS was standing during the incident. *Id.* at 285; Prosecution Exhibit 2.

Legal and Factual Sufficiency

The appellant's first assignment of error claims that the evidence underlying the findings of guilty are legally and factually insufficient, specifically because the Government failed to prove the appellant's sodomy of HS occurred, the military judge acted as a "second prosecutor" during his questioning of the appellant, and the Government failed to prove the appellant formed the requisite intent "to gratify his lust sexual desires" in relation to the indecent liberties offense under Charge II, Specification 1.[3] Appel-

---

[3] The specification reads: "In that Sergeant Edwin A. Ehlers, U.S. Marine Corps, on active duty, did, on board Camp Pendleton, between on or about 1 August 2002 and on or about 1 October 2003, take indecent liberties

lant's Brief and Assignments of Error of 19 Jun [*6] at 5-17. We disagree.

[HN1] The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*; *see also Art. 66(c), UCMJ.* The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325*; *see also Art. 66(c).*

As a predicate matter, we consider the appellant's assertion that the military judge abandoned his impartial role when [*7] he asked questions of the appellant during the litigation of a pretrial motion to suppress the appellant's admissions to SA Meulenberg. Appellant's Brief at 9.[4] [HN2] It is a ba-

---

with [HS], a female under 16 years of age, not the wife of the [appellant], by exposing his penis, masturbating, and ejaculating in front of the said [HS], with intent to gratify the sexual desires of the [appellant]."

[4] In light of the fact that the appellant did not testify in his defense during the trial on the merits, we have not considered this testimony for purposes of our review of the factual and legal sufficiency of the evidence on findings [*8] because it was not "evidence presented at trial." *United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007)*(citations omitted).

sic right of military due process to have "a judge who appears impartial throughout [an accused's] court-martial." *United States v. Cooper, 51 M.J. 247, 250 (C.A.A.F. 1999)*; *see also United States v. Grandy, 11 M.J. 270, 277 (C.M.A. 1981)*; R.C.M. 801(c), Discussion. It has "long been the law" that the military judge may question witnesses. *United States v. Dock, 40 M.J. 112, 127 (C.M.A. 1994).* The military judge does not abandon his impartiality by asking appropriate questions "to clarify factual uncertainties." *United States v. Reynolds, 24 M.J. 261, 264 (C.M.A. 1987)*(citations omitted). Indeed, the military judge has "wide latitude" to ask questions, including "questions which might adversely affect one party or the another." *United States v. Acosta, 49 M.J. 14, 17-18 (C.A.A.F. 1998).*

We find nothing in the questioning of the accused during pretrial motions that indicates the military judge abandoned his impartiality. Moreover, we note that the appellant elected to be tried by military judge alone *after* his motion to suppress his statements to NCIS was litigated pretrial. Record at 242. The appellant's assertion on appeal that the military judge acted as a "second prosecutor" is contrary to the evidence of record, and it is inconsistent with his own affirmative decision to have the same military judge serve as the sole trier of fact in his case following what he now alleges was biased conduct by that military judge. This asserted error merits no relief.

The appellant next contends that, as an eight-year-old witness testifying about matters that occurred when she was four years old, HS was not a

credible witness. We disagree. Preliminary questioning established that HS was a competent witness. HS then testified clearly that the appellant "put his private" in her mouth and that "white stuff came out," although she did not know "what it tasted **[*9]** like." Record at 347-48. She later testified that another name for a boy's "privates" is "penis." *Id.* at 353. Upon questioning by the military judge, HS reiterated twice that the appellant had placed his penis in her mouth. *Id.* at 354, 357. The military judge was positioned as the trier of fact to assess the veracity of HS' testimony by observing her in-court demeanor.

We perceive the testimony of HS at trial to have been in age appropriate terms, not adult-like. Highly persuasive was her description of her male assailant's interest in oral sex, when a child of her years would have no reason to know or to understand the purpose of such an act. Even more persuasive was her description of the appellant's sexual bodily functions, including that a lubricant was used during masturbation, and that ejaculation followed oral sodomy -- facts that, as previously noted, no child would know in the absence of the abuse described. And, if someone described such acts to the child, intentionally or inadvertently, she would have had no context into which to place such facts in order to remember them correctly. In the view of the majority, her graphic testimony would be possible only if she was victim **[*10]** of the sodomy so as to indelibly fix those facts in her mind in the proper sequence.

Even though HS was four years old at the time

of the offense, and eight years old when she testified at trial, we find that HS' recounting of events was compelling and credible, most especially because it was corroborated, in large part, by the appellant's own admissions to NCIS. On the whole of these facts, we find that the evidence amounted to a strong case against the appellant. While we have noted inconsistencies in HS's testimony regarding time and location, such inconsistencies are not uncommon when any abuse victim testifies:

> [T]he evidence . . . is underscored by the fact that the persuasive testimony is from a child, from whom gathering more exact details as to when the sexual conduct precisely began is an unreasonable expectation and formidable hurdle. Any person who suffers from some type of traumatic experience, adult or child, may have difficulty relating that experience in a chronological, coherent and organized manner. *See* Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 Me. L. Rev. 283, 345 (1990).

United States v. Cano, 61 M.J. 74, 77 (C.A.A.F. 2005)(quoting **[*11]** *Paramore v. Filion, F. Supp. 2d 285, 292 (S.D.N.Y. 2003)*).

Finally, in assessing HS's credibility, we do not consider the four-year delay between the abuse and the trial as negatively affecting the child's credibility. Given that the appellant himself corroborated

that the child was with him in the house, in front of the computer, as he sat masturbating, her memory as to these events is clearly neither faulty, fanciful, nor manufactured. Nothing leads us to conclude HS's testimony is credible about the offenses that the appellant admitted, but then to impute a lack of credibility to that portion of her testimony relating to the sodomy, based on an elapsed period of time that applies equally to all of her testimony.

With respect to intent, the record provides ample circumstantial evidence to show the appellant's intent to gratify his own lust and sexual desires by taking indecent liberties with HS. The appellant specifically told SA Meulenberg that he viewed pornography and masturbated twice a day. Gloria and her son both testified they had seen the appellant viewing what appeared to be pornography of teenage girls. Record at 260-61, 333-34. The appellant admitted to NCIS that at the [*12] time of the offenses his relationship with his wife, Gloria, was strained and that they were not having sexual relations. *Id.* at 286. These facts, combined with the testimony of HS that the appellant ejaculated in her presence as a result of sodomizing her, are more than sufficient to establish his intent in taking the preceding indecent liberties with HS was also to gratify his lust.

Despite the credibility challenges made by the appellant at trial and now on appeal, we are mindful that [HN3] reasonable doubt does not require that the evidence be free from conflict. *United States v. Rankin, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006)*(citing *United States v. Lips, 22 M.J. 679, 684*

(A.F.C.M.R. 1986)), aff'd, 64 M.J. 348 (C.A.A.F. 2007). Viewing the evidence in the light most favorable to the prosecution, including all reasonable inferences, we find that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Brown, 65 M.J. 227, 229 (C.A.A.F. 2007)* (quoting *Jackson, 443 U.S. at 318-19*). Likewise, for the reasons set forth above, we too are convinced of the appellant's guilt beyond a reasonable doubt. After weighing all the evidence **[*13]** in the record of trial and recognizing that we did not see or hear the witnesses, we conclude that the appellant is guilty of all specifications and charges beyond a reasonable doubt. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

Multiplicity and Unreasonable Multiplication of Charges

The appellant's third assignment of error alleges that all of the offenses constitute an unreasonable multiplication of charges, and his fourth assignment of error asserts that the sodomy (Charge I), and indecent liberties and assault (Charge II, Specification 1 and 2) offenses are multiplicious under *United States v. Weymouth, 43 M.J. 329 (C.A.A.F. 1995)*. We disagree.

We note that in addition to the sodomy charge and its sole specification, the appellant was charged with six specifications of indecent liberties, and one specification of communicating a threat. In response to a motion to dismiss under R.C.M. 917, the military judge dismissed three of the indecent liberties

specifications, and the communicating a threat specification. Record at 367. Of the remaining three indecent liberties specifications, the military judge found the appellant guilty of only one; not guilty of one; and, **[*14]** of the third, guilty of the lesser included offense of assault consummated by battery. Notwithstanding the appellant's unreasonable multiplication claim regarding all of his charged offenses, we limit our consideration here to the sole conviction for sodomy (Charge I), and the convictions for indecent liberties and assault (Charge II).

We have examined both of the appellant's claims to determine whether the specifications under Charge I or Charge II constitute an unreasonable multiplication of charges. Considering the five factors set forth in *United States v. Quiroz, 57 M.J. 583, 586 (N.M.Ct.Crim.App. 2002)*(en banc), *aff'd, 58 M.J. 183 (C.A.A.F. 2003)*(summary disposition), we conclude that they do not.

[HN4] Multiplicity, a constitutional violation under the *Double Jeopardy Clause*, occurs if a court, "contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Paxton, 64 M.J. 484, 490 (C.A.A.F. 2007)*(quoting *United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993)).*

In that the appellant failed to raise the issue of multiplicity as to the offenses referred for trial, it is waived so long as **[*15]** the specifications are not facially duplicative. *United States v. Heryford, 52 M.J. 265, 266 (C.A.A.F. 2000)*(citing *United States v.*

Britton, 47 M.J. 195, 198 (C.A.A.F.1997)). Our review of the sodomy specification under Charge I satisfies us that it is not facially duplicative with the indecent liberties specifications under Charge II, because both the language of the specifications and facts apparent on the face of the record are different, and not based upon the same conduct. *United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001)*(citing *United States v. Powell, 49 M.J. 460, 464-65 (C.A.A.F. 1998))*; *United States v. Lloyd, 46 M.J. 19, 23 (C.A.A.F. 1997)*. The appellant has not met his burden that plain error exists in relation to any specification under Charge I or Charge II.

Sentence Severity

The appellant's fifth assignment of error alleges his adjudged sentence of confinement for 25 years is inappropriately severe. Based upon our review of the record, we find that the sentence, including 19 years confinement, approved by the convening authority, is appropriate for this offender and his offenses. *United States v. Baier, 60 M.J. 382 (C.A.A.F. 2005)*; *United States v. Healy, 26 M.J. 394 (C.M.A. 1988)*; **[*16]** *United States v. Snelling, 14 M.J. 267 (C.M.A. 1982)*. Granting additional sentence relief at this point would be to engage in additional clemency, a prerogative reserved for the convening authority, who exercised it in this case. *Healy, 26 M.J. at 395-96*.

Prejudice by "Military Misconduct"

We have considered the appellant's remaining assignment of error, and find that it has no merit.

United States v. Reed, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*). As for the appellant's claim of ineffective assistance of counsel, we specifically find that the appellant has failed to meet his burden to show that his defense counsel's performance "fell below an objective standard of reasonableness." *United States v. States v. Edmond, 63 M.J. 343, 345 (C.A.A.F. 2006)*(citing *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and *United States v. Davis, 60 M.J. 469, 473 (C.A.A.F. 2005)*). Despite his allegations of prosecutorial misconduct and unlawful command influence, the appellant has also failed to substantiate either claim. *See United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006)*, and *United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006)*.

Petition [*17] for a New Trial

Following submission of the appellant's brief and assignments of error, the appellant filed a Petition for a New Trial *pro se*. [HN5] A new trial shall not be granted on the basis of newly discovered evidence unless the petition demonstrates that:

> (1) The evidence was discovered after the trial;
>
> (2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (3) The newly discovered evi-

> dence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a more favorable result for the accused.

R.C.M. 1210(f)(2). [HN6] Requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored; relief is granted only if a manifest injustice would result absent a new trial, rehearing, or reopening based on proferred newly discovered evidence. *United States v. Johnson, 61 M.J. 195, 199 (C.A.A.F. 2005).* The denial of an appellant's request for a new trial based on newly discovered evidence is not an abuse of discretion where the evidence did not offer some new version of the facts presented at trial and where additional impeachment material **[*18]** and potential perjury by witnesses would probably not have produced a substantially more favorable result for the accused. *See Johnson, 61 M.J. at 199-201.*

The appellant's petition amounts to a restatement of issues already litigated at trial, and lacks reference to any "newly discovered evidence." The appellant thus fails to meet the criteria set forth in R.C.M. 1210(f). The appellant's petition for a new trial is denied.

Conclusion

The findings and sentence, as approved, are affirmed.

Chief Judge O'TOOLE concurs.

CONCUR BY: J.A. MAKSYM (In Part)

DISSENT BY: J.A. MAKSYM (In Part)

DISSENT

MAKSYM, Judge (dissenting in part, and concurring in part):

I dissent. As a matter of moral conscience and mindful of my oath as a jurist, I cannot bring myself to join my learned brethren in affirming the sodomy conviction below. Clearly, reasonable minds can differ in determining whether or not the Government has satisfied its burden of proof based upon the facts as they have been placed before us.

My marked reservations are, in the main, prompted by the significant delay -- opaquely portrayed in the record of the nearly three year interregnum between the first statement by the minor alleged victim and a trial on the merits. Record at **[*19]** 319-20. These massive delays shroud the entire proceedings with the specter of reasonable doubt. Any explanation from the United States as to the rationale for these delays would have permitted me to place them in context. No such explanation exists.

To be clear, I advance no allegation or even suspicion that the Naval Criminal Investigative Service ("NCIS") or any arm of law enforcement improperly influenced the formulation or content of the alleged minor victim's testimony. I simply draw upon my own knowledge of the ways of the world combined with the admitted and numerous conversa-

tions that took place over the long span of more than three years between this child and her parents as well as investigative and prosecutorial personnel in reaching the conclusion that her testimony is not fully reliable. Moreover, I cannot ignore the multiple assertions of abuse by the child, followed by numerous recantations. I am mindful of the constraints, properly outlined by the majority, that we only consider facts raised within the four corners of the cases-in-chief below. *United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007).*

However, I cannot ignore the uncontroverted fact that the minor witness, **[*20]** four years old at the time of the alleged incident and eight years old at the time of trial, had originally alleged in the NCIS forensic interview that the appellant had committed an act or acts of penile penetration. Yet, at trial she advanced, during incredibly unformulated and non-detail seeking direct examination, an allegation of a single act of oral sodomy. Similarly representative of the child's apparent confusion are the numerous inconsistencies in the record on issues as significant as the location and date of the act, those present at the time of the act, the date the child's family learned of the act, and a later instance of alleged sexual contact between the victim and another child. Record at 260, 264, 270, 275-76, 316, 318-20, 323, 327, 329, 348, 350-51, 354. Moreover, I consider the child's vocabulary during her testimony, unquestionably mature beyond her tender years, as indicative of outside influence, benign or not. *See* Record at 356 (child victim responding "no, not that I'm aware of' to the questioning of the military judge).

This case was not well-tried and left me with significant doubt as to the appellant's culpability for forcible sodomy. Beyond the massive and **[*21]** unexplained delays, the dispositive child testimony, given half a life from the date of the alleged incident and her statement thereafter, was not buttressed by any medico-forensic evidence or expert testimony. I am mindful that the trial judge is in the best position to evaluate the deportment of the witnesses before him and had heard extensive testimony during the litigation of several motions. Of course, as a result of hearing these motions, the military judge would have known that the child witness had originally accused the appellant of an act or acts of penile penetration and three years later made no such accusation and was not examined as to this alleged occurrence by the United States.

Nonetheless, I do have confidence, based upon the inculpatory statement of the appellant that he was guilty of indecent acts, by way of his conducting acts of masturbation in front of a minor child, and admitting to having touched her person during this felonious episode. I would affirm the findings of guilty to assault consummated by a battery and indecent acts with a child, and I would reassess the sentence. I also concur in the majority's resolution of the asserted errors as they relate to **[*22]** these two offenses. However, based upon my significant doubts as to factual sufficiency and the anemic state of the Government's case, I cannot affirm the sodomy conviction. I respectfully dissent.

[ENTERED: JUNE 23, 2010]

United States Court of Appeals
for the Armed Forces
Washington, D.C.

USCA Misc. Dkt. No. 10-0039/MC
Crim. App. Dkt. No. 200800190

UNITED STATES,

Appellee

v.

Edwin A.
EHLERS,

Appellant

On consideration of Appellant's petition for reconsideration of this Court's order, __ M.J. __ (Daily Journal April 23, 2010), it is, by the Court, this 23rd day of June, 2010,

ORDERED:

That petition for reconsideration is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (EISENBERG, Esq.)
Appellate Government Counsel (ECKERT)